92-136

Supreme Court, U.S.
FILED
JUL 20 1992
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1992

DR. JAMES T. McGIBONY, JAMES F. COY, M.D., et al.,

Petitioners,

v.

FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PLAN, et al.,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Florida

PETITION FOR WRIT OF CERTIORARI

ROBERT J. WINICKI
(Counsel of Record)
MAHONEY ADAMS & CRISER, P.A.
50 N. Laura Street
3300 Barnett Center
Jacksonville, Florida 32202
(904) 354-1100

KENT MASTERSON BROWN
BROWN & BROWN, PSC
1114 First National Building
167 W. Main Street
Lexington, Kentucky 40507
(606) 233-7879

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

68 pp

QUESTION PRESENTED FOR REVIEW

Does section 39 of Chapter 88-277 of the Laws of Florida, which imposes a "status tax" of $250 on all Florida licensed physicians, violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDINGS IN THE SUPREME COURT OF FLORIDA

A. Petitioners (Plaintiffs below)

Dr. James T. McGibony

Dr. Joseph Von Thron

Dr. Mark D. Ziffer

Dr. William Barfield

James F. Coy, M.D.

Sidney R. Steinberg, M.D.

Claude A. Boyd, M.D.

All Florida licensed physicians who are not eligible to be "participating" physicians in the Florida Birth-Related Neurological Injury Compensation Plan

B. Respondents (Defendants below)

Florida Birth-Related Neurological Injury Compensation Plan

Florida Birth-Related Neurological Injury Compensation Association

Tom Gallagher, in his official capacity as the head of the Florida Department of Insurance

George Stuart, in his official capacity as the head of the Florida Department of Professional Regulation[1]

---

[1] At the time the complaint was filed, Laurence Gonzalez was the head of the Florida Department of Professional Regulation. He has been succeeded in office by George Stuart.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDINGS IN THE SUPREME COURT OF FLORIDA ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED 2

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT 7

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Coy v. Florida Birth-Related Neurological Injury Compensation Plan, 595 So.2d 943 (Fla. 1992)..... 1, 5, 7

Eastern Airlines, Inc. v. Department of Revenue, 455 So.2d 311 (Fla. 1984), *appeal dismissed*, 474 U.S. 892 (1985)..... 4

Nordlinger v. Hahn, ___ U.S. ___, 60 U.S.L.W. 4563 (June 18, 1992)..... 7

STATUTES

28 U.S.C. § 1257..... 2

28 U.S.C. § 1341..... 4

Fla. Stat. § 766.303 (1991)..... 3

Fla. Stat. § 766.314 (1991)..... 2, 3

No. _____

In The

Supreme Court of the United States

October Term, 1992

DR. JAMES T. McGIBONY, JAMES F. COY, M.D., et al.,

Petitioners,

v.

FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PLAN, et al.,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Florida

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at 595 So.2d 943 (Fla. 1992) (Appendix A). The opinion of the Florida First District Court of Appeal is reported at 564 So.2d 177 (Fla. App. Ct. 1990) (Appendix B). The final order of the Florida Second Circuit Court is not reported (Appendix C).

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The date of the opinion of the Supreme Court of Florida is February 12, 1992 (Appendix A). The date of denial of a timely petition for rehearing was April 22, 1992 (Appendix D). The statutory provision which confers jurisdiction on this Court is 28 U.S.C. § 1257(a), and it provides: "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the . . . validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution . . . of the United States . . . "

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent part of section 39 of Chapter 88-277 of the Laws of Florida, codified at section 766.314(4)(b)1-3 of the Florida Statutes (1991), provides:

> 1. On or before October 15, 1988, all physicians licensed pursuant to chapter 458 or chapter 459 as of October 1, 1988, other than participating physicians, shall be assessed an initial assessment of $250, which must be paid no later than December 1, 1988.
>
> 2. Any such physician who becomes licensed after September 30, 1988, and before January 1, 1989, shall pay into the association an initial assessment of $250 upon licensure.
>
> 3. Any such physician who becomes licensed on or after January 1, 1989, shall pay an

initial assessment equal to the most recent assessment made pursuant to this paragraph, paragraph (5)(a), or paragraph (7)(b).

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides: "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE

Petitioners are Florida licensed physicians representing a class who are not eligible to be "participating" physicians in the Florida Birth-Related Neurological Injury Compensation Plan (the "Plan"), enacted by the Florida Legislature in 1988. Fla. Stat. §§ 766.301-766.316 (1991). The Plan is administered by the Florida Neurological Injury Compensation Association (the "Association"). *Id.* at § 766.314(2). In essence, the Plan provides for a no-fault compensation system for certain neurologically-injured infants born after January 1, 1989. *Id.* at § 766.303(1). The protections, including immunity from malpractice based on negligence, afforded by the Plan are available only to "participating" physicians. *Id.* at 766.303(2). Physicians who practice obstetrics either full time or part time can participate in the Plan by paying an initial and annual assessment of $5,000. *Id.* at § 766.314(4)(c). Physicians, such as the petitioners, who do not practice obstetrics and cannot participate, are required to pay an initial annual assessment of $250. *Id.* at § 766.314(4)(b). Petitioners, as a class, pay four times

more into the Plan than the amount paid by the participating obstetricians. The petitioners, as non-participating physicians, are not afforded any of the protections of the Plan.

On February 12, 1992, the Supreme Court of Florida in a four to three decision affirmed the trial court's finding that the financing mechanism of the Florida Birth-Related Neurological Injury Compensation Plan created by the Florida Legislature in Chapter 88-277 of the Laws of Florida, did not violate the petitioners' rights under the equal protection clauses of the United States and Florida Constitutions.

The federal equal protection constitutional issue was first raised in the initial complaints, and was ruled upon in the final order of the trial court (appendix C) and in the opinion of the Florida First District Court of Appeal (Appendix B). (The complaints were originally filed in Florida state court because of the Tax Injunction Act, 28 U.S.C. § 1341.) The issue was again raised in the Supreme Court of Florida, which chose not to specifically address the federal, as opposed to Florida, equal protection issue (Appendix C). The federal challenge was dismissed as a "remaining attack" which was "without merit and need not be discussed." The petition for rehearing was denied on April 22, 1992.

The four member majority of the Supreme Court of Florida dispatched the petitioners' argument that there was no rational basis for singling out their class of non-participating physicians for contribution to the Plan. After quoting its equal protection standard from *Eastern Airlines, Inc. v. Department of Revenue*, 455 So.2d 311, 314

(Fla. 1984), *appeal dismissed*, 474 U.S. 892 (1985), the court found as follows:

> All doctors rely on efficiently operated hospitals. The record is clear that when there is an unavailability of obstetrical services, the operations of hospitals are seriously disrupted. Emergency rooms are overtaxed and nonspecialists are put in a position of having to treat the patients. Because health care services are delivered by a team of providers, all of whom interact and depend upon one another, a breakdown in one area of service impacts the other areas. Moreover, without an adequate number of obstetricians, the ability of other physicians to refer their patients is adversely affected.
>
> Sections 766.301-.316, Florida Statutes (1989), seek to ensure the availability of obstetrical services. We are convinced that all physicians, regardless of whether they practice obstetrics, derive a benefit from this legislation that is greater in degree than that derived by the general public. While the benefits accruing to nonobstetrical physicians are obviously less than those obtained by obstetricians, the legislature recognized this by assessing them only $250 as compared to $5000.

Coy v. Florida Birth-Related Neurological Injury Compensation Plan, 595 So.2d 943, 946-47 (Fla. 1992).

In a strongly worded dissent, Justice Kogan, joined by two other members of the Supreme Court of Florida, disagreed with the majority's application of the rational basis test. The dissent stated:

> In the present case, the state has enacted a program designed in principle to benefit the

public as a whole, but that effectively benefits only obstetricians who elect to join the plan and those persons who suffer losses caused by certain birth-related injuries attributable to the member-obstetricians. While this is a laudable purpose, I can find no rational basis for imposing much of the burden of this program primarily on physicians *as a class*, including those who do not practice obstetrics and have no connection whatsoever with the delivery of babies. I think this particularly is true in light of the fact that obstetricians are not obliged to join the plan, and many have exercised this option.

To my way of thinking, this type of "status tax" – one based exclusively on a person's station in life or membership in a particular group – cannot pass even the relaxed standards of the rational basis test unless there is some logical and reasonable nexus between the status of the taxpayer and the purpose the tax is intended to achieve. Art. I, § 2, Fla. Const. There are obvious reasons for this requirement.

It is truism that the power to tax is the power to destroy. While this phrase is so often repeated as to be cliche, I find nothing trite in the suggestion that the legislature can tax a person's status without proper reasons. Such a precedent would make equal protection on illusory right. In the present case, the legislature has sought to tax primarily physicians to pay for insurance against certain birth-related injuries. This is little different from taxing only schoolteachers to pay for new educational facilities, or taxing only licensed psychologists to pay for public mental-health care, or taxing only policemen to pay for victims' compensation programs.

> One step further along this doubtful train of logic would lead to the conclusion that society can shift its more onerous tax burdens exclusively onto those minorities or groups that lack a sufficient voice in the state capitol. Political expedience might encourage this practice, since legislators could raise revenue without imposing an unpopular general tax. While I recognize that some inequities in taxation are inevitable and tolerable under the Florida Constitution, the guarantees of the Declaration of Rights clearly will not tolerate the gross inequity apparent in the present case.
>
> Equal protection means that similarly situated people are treated similarly by the law and that, at a minimum, irrational distinctions may not be drawn. This guarantee was violated by the statute in question, and to that extent I believe the statute should not be allowed to stand.

Id. at 948-49 (Kogan, J., dissenting).

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The Florida appellate courts have decided an important question of federal constitutional law that has not been decided or settled by this Court, namely whether the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution is violated by the imposition of a "status tax."

Recently, this Court in *Nordlinger v. Hahn*, ___ U.S. ___, 60 U.S.L.W. 4563 (June 18, 1992), applied the Equal

Protection Clause of the Fourteenth Amendment to California's Proposition 13 exemptions. While this Court recognized the large leeway granted States in making classifications with respect to reasonable systems of taxation, it did "require that a purpose may conceivably or 'may reasonably have been the purpose and policy' of the relevant governmental decisionmaker" in order to establish a rational basis supporting the classification. *Id.* at 4567.

The four member majority of the Supreme Court of Florida allows the State of Florida to tax a person's status in life without a proper reason. The Florida Legislature has taxed physicians to pay for insurance against certain birth-related injuries. As the minority three member dissenting opinion stated: "This is little different from taxing only schoolteachers to pay for new educational facilities, or taxing only licensed psychologists to pay for public mental-health care, or taxing only policemen to pay for victims' compensation programs." *Coy,* 595 So.2d at 948. Allowance of such taxation endorses the view "that society can shift its more onerous tax burdens exclusively onto those minorities or groups that lack a sufficient voice in the state capitol." *Id.* at 949.

CONCLUSION

This Court should grant certiorari in order to determine whether a "status tax" violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Respectfully submitted,

ROBERT J. WINICKI
(Counsel of Record)
MAHONEY ADAMS & CRISER, P.A.
50 N. Laura Street
3300 Barnett Center
Jacksonville, Florida 32202
(904) 354-1100

KENT MASTERSON BROWN
BROWN & BROWN, PSC
1114 First National Building
167 W. Main Street
Lexington, Kentucky 40507
(606) 233-7879

Attorneys for Petitioners

No. _____

In The

Supreme Court of the United States

October Term, 1992

DR. JAMES T. McGIBONY, JAMES F. COY, M.D., et al.,

Petitioners,

v.

FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PLAN, et al.,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

INDEX TO APPENDIX

Appendix A – Opinion of the Supreme Court of Florida, dated February 12, 1992 ..... A-1

Appendix B – Opinion of the Florida First District Court of Appeal, dated June 25, 1990 ..... A-17

Appendix C – Final Order of the Florida Second Circuit Court, dated September 12, 1989 ..... A-25

Appendix D – Order of the Supreme Court of Florida Denying Petition for Rehearing, dated April 22, 1992 ..... A-55

SUPREME COURT OF FLORIDA

No. 76,565

JAMES F. COY, M.D., et al.,

Petitioners,

vs.

FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PLAN, et al.,

Respondents.

[February 13, 1992]

PER CURIAM.

We have for review *McGibony v. Florida Birth-Related Neurological Injury Compensation Plan*, 564 So. 2d 177 (Fla. 1st DCA 1990), which expressly declared section 766.314, Florida Statutes (1989), to be valid. We have jurisdiction. Art. V, § 3(b)(3), Fla. Const.

Several physicians practicing in areas other than obstetrics filed this action against the Florida Birth-Related Neurological Injury Compensation Plan (the Plan), an entity created as part of the medical malpractice reforms enacted in 1988. *See* chs. 88-1 & 88-277, Laws of Fla. (codified at §§ 766.301-.316 (Supp. 1988)). Essentially, the Plan administers a no-fault system to insure against certain types of neurological injuries suffered by infants at birth. However, obstetricians are not required to join the Plan, and insurance thus is available only if the

obstetrician has elected to join. Those who join pay an annual assessment of at least $5000. § 766.314(4)(c), Fla. Stat. (1989).

To further fund the Plan, the statute imposes on *all* licensed physicians, not merely obstetricians, a mandatory annual assessment of $250. § 766.314(4)(b), Fla. Stat. (1989). Although not at issue in this case, licensed hospitals also are assessed $50 per infant delivered. § 766.314(4)(a), Fla. Stat. (1989). These amounts can be increased by action of the Plan whenever it finds that the Plan cannot otherwise be maintained on an "actuarially sound" basis, subject to oversight by the Department of Insurance. § 766.314(5), (7), Fla. Stat. (1989).

The physicians who brought this cause argued that the assessments against them are unconstitutional because they derive no benefit from it greater than does the general public. They note that they have been singled out to pay a large part of the cost while the general public pays nothing. The evidence at trial indicated that 27,922 physicians paid the $250 assessment for 1989, while only 535 obstetricians elected to join the Plan. (Approximately 17,000 other physicians failed to pay the 1989 assessments.) The physicians argued that the link between the tax and its benefits was too tenuous to meet constitutional standards.

The trial court and the First District Court of Appeal rejected all these claims. The court below held that the Plan does not violate due process or equal protection, is not an impermissible delegation of legislative authority, and meets the standards for tax statutes established in *Eastern Air Lines, Inc. v. Department of Revenue,* 455 So. 2d

311 (Fla. 1984), *appeal dismissed*, 474 U.S. 892 (1985). *McGibony*, 564 So. 2d at 179-80.

Initially, we find that the $250 assessment in this case constitutes a "tax" within the meaning of Florida law. In the past, we have defined a tax as an enforced pecuniary burden laid on individuals or property to support government. *State ex rel. Clark v. Henderson*, 137 Fla. 666, 188 So. 351 (1939). Here, the $250 assessment is levied upon physicians to support a governmental enterprise, i.e., a state-created system for compensating certain individuals for certain types of birth-related injuries. The assessment is collected under authority of state law, and the Plan can sue to enforce the assessment. § 766.314(6)(b)1, Fla. Stat. (1989). It thus is a tax and is subject to the requirements of law applicable to taxes.

In the *Eastern Air Lines* case, this Court established the following test for gauging the validity of a taxing statute:

> When the state legislature, acting within the scope of its authority, undertakes to exert the taxing power, every presumption in favor of the validity of its action is indulged. Only clear and demonstrated usurpation of power will authorize judicial interference with legislative action. In the field of taxation particularly, the legislature possesses great freedom in classification. The burden is on the one attacking the legislative enactment to negate every conceivable basis which might support it. The state must, of course, proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. A statute that discriminates in favor of

> a certain class is not arbitrary if the discrimination is founded upon a reasonable distinction or difference in state policy.

Eastern Air Lines, 455 So. 2d at 314 (citations omitted). Obviously, this test provides the "rational basis" standard for weighing claims that a tax statute violates equal protection. *See* art. I, § 2, Fla. Const.

We find that the rational basis test applies in the present case, as opposed to the strict-scrutiny standard, because physicians are not a "suspect" class within the meaning of the equal protection provision of the Florida Constitution. *Id.* A "suspect class" is any group that has been the traditional target of irrational, unfair, and unlawful discrimination. *DeAyala v. Florida Farm Bureau Casualty Ins. Co.*, 543 So. 2d 204, 206 (Fla. 1989); *Palm Harbor Special Fire Control Dist. v. Kelly*, 516 So. 2d 249, 251 (Fla. 1987). Physicians do not meet this definition, and the applicable standard thus is the "rational basis" test described in *Eastern Air Lines*.

Applying this test to the facts at hand, we conclude that there is a rational basis for the statutory assessment of all physicians even though they do not practice obstetrics. In upholding the constitutionality of the statute, the trial judge made the following comprehensive findings of fact:

> The Plan bears a reasonable relationship to its stated purposes, by insuring the availability of obstetrical care to Florida citizens and by providing for the care of Florida children who suffer birth-related neurological injuries, and Plaintiffs bear a reasonable relationship to the

Plan. As documented and reported by the Academic Task Force, physicians play a critical role in the delivery of health care services and all physicians were adversely affected by the medical malpractice crisis which engulfed this state and severely disrupted the delivery of health care services and the day-to-day operations of hospitals throughout the state.

The Defendant's witness, Mr. Jay Weinstein, an expert in hospital administration, provided unrefuted testimony regarding the extent and effects of the disruption in the delivery of health care services. *See* Transcript of final hearing, pages 71-79, 81-85.

For example, various critical services including emergency room, trauma, obstetrical, and neurosurgery were reduced or eliminated and, consequently, remaining services were overloaded. Referrals among physicians were reduced and hospitals found it difficult to recruit and maintain staff. Access to major health care services was limited and, as a result, the relationship between the public and the medical profession deteriorated.

The effects of the disruption of obstetrical services are particularly severe. When those services are not provided, the emergency room staff is overloaded and "the system is pushed to the wall." Negative economic consequences befall the hospital as well, since mothers are a primary source of patient referrals for physicians in all specialties.

The devastating effects of the disruption in the delivery of obstetrical services were confirmed even by Plaintiffs' expert, Dr. Masterson, who, during questioning, testified:

Question: "Hypothetically, let's assume for a moment that all of the obstetrical physicians on that staff, because of malpractice premiums and because of – frankly, because of the problems associated with malpractice, including having to come to the courthouse and testify, and so forth, decided they had had enough. And they had decided that they have had enough so much that they decided to stop either treating indigent patients, which are sometimes a common problem pregnancy, or otherwise just stop practicing OB. Based on that hypothetical I gave you and your small knowledge of Jackson, would that have an effect on that hospital's operations?"

Answer: "It would be disastrous."

Question: "That disaster would permeate that hospital; wouldn't it?"

Answer: "I presume, yes."

See Transcript of final hearing, page 35.

Additionally, hospitals which do not provide obstetrical services are also negatively impacted by the crisis as they struggle to refer their patients to other, unfamiliar facilities.

Conversely, when the malpractice crisis is lessened and health care services can be delivered smoothly and efficiently, benefits will be seen and felt throughout the health care industry.

> For example, access to health care services will be expanded as services which were eliminated or reduced during the crisis are again offered. Emergency rooms and trauma centers will re-open. Patient referrals will increase and physicians will be able to practice in pleasant and full service facilities. Essentially, the negative consequences of the malpractice crisis will be alleviated.
>
> In light of these facts, Plaintiffs' claim that they are not related to the goals of this plan cannot be sustained. Health care services are delivered by a team of providers, all of whom interact and depend on one another. The malpractice crisis severely disrupted the delivery of health care services and all members of the "team" suffered. Since one of the goals of the Plan is to help alleviate the crisis and permit the efficient delivery of health care services by all members of the team, Plaintiffs are undeniably related to at least one of the goals of the Plan and stand to benefit from its realization. This act is not a cure all, but will be a major contribution to the cure. Thus, the Legislature's decision to require Plaintiffs to contribute to the Plan was not wholly unreasonable, arbitrary, or capricious.

There is competent substantial evidence to support these findings. All doctors rely on efficiently operated hospitals. The record is clear that when there is an unavailability of obstetrical services, the operations of hospitals are seriously disrupted. Emergency rooms are overtaxed and nonspecialists are put in a position of having to treat the patients. Because health care services are delivered by a team of providers, all of whom interact

and depend upon one another, a breakdown in one area of service impacts the other areas. Moreover, without an adequate number of obstetricians, the ability of other physicians to refer their patients is adversely affected.

Sections 766.301-.316, Florida Statutes (1989), seek to ensure the availability of obstetrical services. We are convinced that all physicians, regardless of whether they practice obstetrics, derive a benefit from this legislation that is greater in degree than that derived by the general public. While the benefits accruing to nonobstetrical physicians are obviously less than those obtained by obstetricians, the legislature recognized this by assessing them only $250 as compared to $5000.

We also do not believe that the statute at issue constitutes an impermissible delegation of legislative authority to tax to the Department of Insurance. Section 766.314(7)(b), Florida Statutes (1989), reads as follows:

> (b) If the Department of Insurance finds that the plan cannot be maintained on an actuarially sound basis based on the assessments and appropriations listed in subsections (4) and (5), the department shall increase the assessments specified in subsection (4) on a proportional basis as needed.

The reference to "actuarially sound basis" obviously refers to the consideration of whether the assets and projected income of the Plan will be sufficient to meet the anticipated claims against it. In passing on the constitutionality of the Florida Patients Compensation Fund, this Court in *Department of Insurance v. Southeast Volusia Hospital District*, 438 So. 2d 815, 819 (Fla. 1983), stated:

> The district court found the statute to be almost totally absent of guidelines and standards for the establishment of fees and assessments. The opinion cited six provisions which were deemed invalid for giving "sole discretion" to the Fund in the absence of sufficient guidelines. The first provision held to be constitutionally infirm is the provision which directs that base fees for health maintenance organizations, ambulatory surgical centers and other medical facilities (as defined by § 768.54(1)(c)) are to be "established by the fund on an actuarially sound basis." The district court stated that this part of the statute left to the Fund sole discretion for establishing the amount of fees. We do not agree. . . . The courts of Florida have found concepts of actuarial soundness to be a meaningful standard. *McNulty v. Blackburn*, 42 So. 2d 445, 447 (Fla. 1949). The Florida Constitution employs the standard of "sound actuarial basis." Art. X, § 14, Fla. Const. These principles are also incorporated in other statutes. §§ 627.062(2)(a) & 627.0651(2), Fla. Stat. (Supp. 1982). There is simply no merit to this argument.

Southeast Volusia cannot be meaningfully distinguished. The fact that the Florida Patients Compensation Fund statute established a ceiling on the amount of money the compensation program could have on hand had nothing to do with the determination of whether the concept of actuarial soundness was a meaningful standard. Likewise, such specific criteria for the charging of fees which may have been included in that statute were totally unrelated to the question of what was meant by actuarial soundness.

Further, we reject the contention that the amendment to section 766.314 contained in chapter 89-186, Laws of Florida, means that the amount of any additional assessments is to be determined by the Florida Birth-Related Neurological Injury Compensation Association rather than the Department of Insurance. Section 766.314(2) provides that the association shall submit to the Department of Insurance for review a plan of operation which includes provisions for the assessment of the physicians. The plan of operation and any amendments to the plan are subject to the approval of the Department of Insurance. Section 766.314(5)(a) provides that "the association shall determine the amount of additional assessments necessary pursuant to subsection (7), in the manner required by the plan of operation, subject to any increase determined to be necessary by the Department of Insurance pursuant to paragraph (7)(b)." Section 766.314(7)(b) clearly placed the decision concerning the need for an increase upon the Department of Insurance. We interpret the statute as requiring the Department of Insurance to authorize any increased assessment. *See Miami Dolphins Ltd. v. Metropolitan Dade County*, 394 So. 2d 981 (Fla. 1981) (statute shall not be stricken as an unconstitutional delegation of powers where it is susceptible to a constitutional interpretation).

Finally, we do not find the statute to be in violation of the Privileges and Immunities Clause of the Fourteenth Amendment to the United States Constitution. Under section 766.314(4)(b), all physicians licensed under chapters 458 and 459, Florida Statutes (1989), except obstetricians, are subject to an equal assessment of $250. The assessment has no relationship to the residence of the

licensee. The assessment is upon the privilege of holding a license to practice medicine in this state. The fact that a nonresident may receive less benefit from the assessment is simply a result of the decision to live outside the state of Florida.

The remaining attacks against the statute are without merit and need not be discussed. We hold that section 766.314 is constitutionally valid and approve the decision below.

It is so ordered.

OVERTON, McDONALD, GRIMES and HARDING, JJ., concur.

KOGAN, J., concurs in part and dissents in part with an opinion, in which SHAW, C.J. and BARKETT, J., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

KOGAN, J., concurring in part, dissenting in part.

I concur in the majority's conclusion that this case is governed by the rational basis test and that physicians are not a "suspect class" within the meaning of the equal protection clause of the Florida Constitution. I dissent as to the application of the rational basis test in this case.

In the present case, the state has enacted a program designed in principle to benefit the public as a whole, but that effectively benefits only obstetricians who elect to join the plan and those persons who suffer losses caused by certain birth-related injuries attributable to the member-obstetricians. While this is a laudable purpose, I can find no rational basis for imposing much of the burden of

this program primarily on physicians *as a class,* including those who do not practice obstetrics and have no connection whatsoever with the delivery of babies. I think this particularly is true in light of the fact that obstetricians are not obliged to join the plan, and many have exercised this option.

To my way of thinking, this type of "status tax" – one based exclusively on a person's station in life or membership in a particular group – cannot pass even the relaxed standards of the rational basis test unless there is some logical and reasonable nexus between the status of the taxpayer and the purpose the tax is intended to achieve. Art. I, § 2, Fla. Const. There are obvious reasons for this requirement.

It is a truism that the power to tax is the power to destroy. While this phrase is so often repeated as to be cliche, I find nothing trite in the suggestion that the legislature can tax a person's status without proper reasons. Such a precedent would make equal protection an illusory right. In the present case, the legislature has sought to tax primarily physicians to pay for insurance against certain birth-related injuries. This is little different from taxing only schoolteachers to pay for new educational facilities, or taxing only licensed psychologists to pay for public mental-health care, or taxing only policemen to pay for victims' compensation programs.

One step further along this doubtful train of logic would lead to the conclusion that society can shift its more onerous tax burdens exclusively onto those minorities or groups that lack a sufficient voice in the state

capitol. Political expedience might encourage this practice, since legislators could raise revenue without imposing an unpopular general tax. While I recognize that some inequities in taxation are inevitable and tolerable under the Florida Constitution, the guarantees of the Declaration of Rights clearly will not tolerate the gross inequity apparent in the present case.

Equal protection means that similarly situated people are treated similarly by the law and that, at a minimum, irrational distinctions may not be drawn. This guarantee was violated by the statute in question, and to that extent I believe the statute should not be allowed to stand.

In reaching these conclusions, I do not imply that a status tax is always unconstitutional under article I, section 2 of the Florida Constitution. For example, in *Department of Insurance v. Southeast Volusia Hospital District*, 438 So. 2d 815 (Fla. 1983), this Court confronted a case in which a medical malpractice compensation fund was financed through assessments levied only against its members in exchange for a form of malpractice insurance. All health care providers could elect to join, and all hospitals were required to join *unless they could demonstrate financial responsibility*. Hospitals, health maintenance organizations, and similar organizations – but not individual health-care providers – also were subject to increased assessments.

This Court upheld the increased, mandatory assessments against hospitals that could not demonstrate financial responsibility, because they stood in a different position than other health-care providers. Obviously, hospitals are large enterprises that dispense the bulk of the

most important and demanding medical care available in our society. The legislature rationally could conclude, first, that hospitals unable to demonstrate financial responsibility must have some form of malpractice insurance so that the public will be protected; second, that no similar requirement need be imposed on other health-care providers such as physicians and dentists; and, third, that the brunt of the cost of this insurance should fall on the hospitals themselves. Although this is a status tax, the status of the taxpayer is rationally related to the purpose of the tax and therefore is constitutional. Art. I, § 2, Fla. Const.

The *Southeast Volusia* case thus involved a situation vastly different from the facts at hand, contrary to the majority's assertion. Here, all physicians are forced to bear a substantial part of the cost of a program that provides no direct benefit whatsoever to the vast majority of their number. In *Southeast Volusia*, every member of the compensation plan clearly received a quid pro quo: By joining or being forced to join, they were guaranteed a form of malpractice insurance. No such quid pro quo exists in the present case, nor is the assessment otherwise rationally related to the activities or status of the group singled out to be taxed.[1]

Thus, I would quash the opinion below, hold the relevant statutes unconstitutional, and remand to the trial court to determine whether and to what extent refunds are owed to petitioners under the principles announced

---

[1] Of course, a status tax against physicians would be permissible if it helped finance the state's efforts to regulate the practice of medicine.

in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 110 S.Ct. 2238 (1990), and any other applicable law or precedent.

SHAW, C.J. and BARKETT, J., concur.

Application for Review of the Decision of the District Court of Appeal – Statutory Validity
First District – Case Nos. 89-2569 & 89-2593

(Leon County)

Donna H. Stinson of Moyle, Flanigan, Katz, Fitzgerald & Sheehan, West Palm Beach, Florida; and Kent Masterson Brown, Lexington, Kentucky,

for Petitioners

Wilbur E. Brewton and J. Riley Davis of Taylor, Brion, Buker & Greene, Tallahassee, Florida; and Robert A. Butterworth, Attorney General and George L. Waas, Assistant Attorney General, Tallahassee, Florida,

for Respondents

Thomas J. Maida and Patricia H. Malono of McConnaughhay, Roland, Maida, Cherr & McCranie, P.A., Tallahassee, Florida,

Amicus Curiae for Drs. J. Thomas Atkins, Max Sugar, John A. Tirpak and Marvin A. Perer

William H. Adams, III and Robert J. Winicki of Mahoney, Adams & Criser, P.A., Jacksonville, Florida; and John E. Thrasher, General Counsel of Florida Medical Association,

Amicus Curiae for Drs. James T. McGibony, Joseph Von Thron, Mark D. Ziffer and William Barfield

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

DR. JAMES T. MCGIBONY, DR. JOSEPH VON THORN, DR. MARK D. ZIFFER and DR. WILLIAM BARFIELD, on behalf of themselves and all others similarly situated, Appellants, v. FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PLAN, FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION, TOM GALLAGHER, in his official capacity as the head of THE FLORIDA DEPARTMENT OF INSURANCE and LAURENCE GONZALEZ, in his official capacity as the head of THE FLORIDA DEPARTMENT OF PROFESSIONAL REGULATION, Appellees.	*	NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED. CASE NO. 89-2569
ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, INC., JAMES F. COY, M.D., SIDNEY R. STEINBERG, M.D., and CLAUDE A. BOYD, M.D., on behalf of themselves and all others similarly situated,	*	CASE NO. 89-2593

Appellants,

v.

FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PLAN, FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION, and TOM GALLAGHER in his official capacity as the head of THE FLORIDA DEPARTMENT OF INSURANCE,.

Appellees.

Opinion filed June 25, 1990.

Appeal from the Circuit Court for Leon County, Ted Steinmeyer, Judge.

William H. Adams, III and Robert J. Winicki of Mahoney, Adams & Criser, P.A., and John E. Thrasher, Florida Medical Association, Jacksonville, for Appellants Dr. James T. McGibony, Dr. Joseph Von Thorn, Dr. Mark D. Ziffer and Dr. William Barfield.

Kent Materson Brown, Lexington, Ky and Donna H. Stinson of Moyle, Flanigan, Katz & Fitzgerald, Tallahassee, for Appellants Association of American Physicians and Surgeons, Inc., James F. Coy, M.D., Signey R. Steinberg, M.D. and Claude A. Boyd, M.D.

J. Riley Davis, Wilbur E. Brewton, and Kenneth D. Goldberg of Taylor, Brion, Buker & Greene, Tallahassee, for Appellees Florida Birth-Related Neurological Injury

Compensation Plan and Florida Birth-Related Neurological Injury Compensation Association.

Thomas J. Maida and Patricia H. Malono of Karl, McConnaughhay, Roland & Maida, Tallahassee, for Amicus Curiae Doctors J. Thomas Atkins, Max Sugar, John A. Tirpak, and Marvin A. Perer.

Neil H. Butler, Tallahassee, for Amicus Curiae Association of Voluntary Hospitals of Florida, Inc.

ALLEN, J.

Physicians licensed by the Florida Department of Professional Regulation brought actions against the appellees challenging the constitutionality of the funding prescribed for the Florida Birth-Related Neurological Injury Compensation Plan (Plan) created by Chapters 88-1 and 88-277, Laws of Florida. The physicians contended that since they did not provide obstetrical services they would receive no more benefit from the Plan than any other member of the general public. Consequently, they argued that their right under the due process and equal protection guarantees of the federal and state constitutions were violated when they were called upon to contribute to the Plan, where no such requirement was placed upon the general public. They also alleged that the statute contains an unlawful delegation of the taxing authority. This appeal is from a judgment in favor of appellees on all issues. We affirm.

Chapter 88-1, Section 60, now codified as Section 766-301, Florida Statutes (1989), sets forth findings in support of the legislation as follows:

766.301 Legislative findings and intent

(1) The Legislature makes the following findings:

(a) Physicians practicing obstetrics are high-risk medical specialists for whom malpractice insurance premiums are very costly, and recent increases in such premiums have been greater for such physicians than for other physicians.

(b) Any birth other than a normal birth frequently leads to a claim against the attending physician; consequently, such physicians are among the physicians most severely affected by current medical malpractice problems.

(c) Because obstetric services are essential, it is incumbent upon the Legislature to provide a plan designed to result in the stabilization and reduction of malpractice insurance premiums for providers of such services in Florida.

(d) The costs of birth-related neurological injury claims are particularly high and warrant the establishment of a limited system of compensation irrespective of fault.

(2) It is the intent of the Legislature to provide compensation, on a no-fault basis, for a limited class of catastrophic injuries that result in unusually high costs for custodial care and rehabilitation. This plan shall apply only to birth-related neurological injuries.

A portion of Chapter 88-1 created the Plan, which provides a no-fault compensation system for certain neurologically injured infants. The Plan's financing scheme, found in Section 73 of Chapter 88-1, as amended by

Sections 39 and 41 of Chapter 88-277, Laws of Florida, codified as Section 766.314, Florida Statutes (1989), calls for payments from hospitals, physicians, the Insurance Commissioner's Regulatory Trust Fund, and, in certain circumstances, casualty insurance carriers. Physicians who practice obstetrics either full-time or part-time can participate in the Plan by paying an initial and annual assessment of $5,000. Physicians, such as the appellants, who do not practice obstetrics and cannot participate, are required to pay an initial and annual assessment of $250. The section also authorizes the Department of Insurance to proportionally increase assessments in order to maintain the Plan on "an actuarially sound basis."

The appellants first contend that they receive no greater benefit from the Plan than other members of the general public. Therefore, they argue that there is no rational basis for singling out their class of nonparticipating physicians for contribution to the Plan. They assert that use of the classification is arbitrary and discriminatory in violation of the due process and equal protection guarantees of the federal and state constitutions.

In *Eastern Air Lines, Inc. v. Department of Revenue*, 455 So.2d 311 (Fla. 1984), *appeal dismissed*, 474 U.S. 892, 106 S.Ct. 213, 88 L.Ed.2d 214 (1985), the Florida Supreme Court established the standard of review by which tax legislation, challenged on the same constitutional grounds raised by appellants, is to be evaluated. The court said the following:

> When the state legislature, acting within the scope of its authority, undertakes to exert the taxing power, every presumption in favor of the validity of its action is indulged. Only clear and

> demonstrated usurpation of power will authorize judicial interference with legislative action. *Walters v. City of St. Louis*, 347 U.S. 231, 74 S.Ct. 505, 98 L.Ed. 660 (1954). In the field of taxation particularly, the legislature possesses great freedom in classification. The burden is on the one attacking the legislative enactment to negate every conceivable basis which might support it. *Madden v. Kentucky*, 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed.. 590 (1940); *Just Valuation & Taxation League, Inc. v. Simpson*, 209 So.2d 229, 323 (Fla. 1968). The state must, of course, proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. *Department of Revenue v. AMREP Corp.*, 358 So.2d 1343, 1349 (Fla. 1978). A statute that discriminates in favor of a certain class is not arbitrary if the discrimination is founded upon a reasonable distinction or difference in state policy. *Allied Stores v. Bowers*, 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed.2d 321 (1959).

Id. at 314.

Recognizing the standard of judicial review explicated in *Eastern Air Lines, Inc. v. Department of Revenue*, the court looked at legislative history and other evidence presented at trial to determine whether there was a rational basis for the legislature to have called upon physicians not practicing obstetrics to contribute to the Plan. In doing so, the trial court found that Chapters 88-1 and 88-277, Laws of Florida, were enacted in response to a medical malpractice crisis which engulfed our state, severely disrupted the delivery of health care services, and adversely affected all Florida physicians. Further, evidence was presented that health care services are delivered by a team of providers, all of whom interact

and depend upon one another, and that a breakdown in one area of service impacts other areas. The trial court found and held as follows:

> Since one of the goals of the Plan is to help alleviate the crisis and permit the efficient delivery of health care services by all members of the team, plaintiffs are undeniably related to at least one of the goals of the Plan and stand to benefit from its realization. * * * Thus, the Legislature's decision to require plaintiffs to contribute to the Plan was not wholly unreasonable, arbitrary, or capricious.

We find that there was ample factual basis for the trial court's holding on this issue. Consequently, we reject the appellants' due process and equal protection arguments.

The appellants also contend that the statutory authorization for the Department of Insurance to proportionally increase assessments to maintain the Plan is an unlawful delegation of legislative taxing power. They argue that the "actuarially sound" standard set forth in the statute is insufficient to enable the Department of Insurance and the courts to determine whether the legislative intent is being implemented. Because of the Supreme Court's holding in *Department of Ins. v. Southeast Volusia Hosp. Dist.*, 438 So.2d 815 (Fla. 1983), *appeal dismissed*, 466 U.S. 901, 104 S.Ct. 1673, 80 L.Ed.2d 149 (1984), we must reject the appellants' argument on this point. There, the Supreme Court held the "actuarially sound" standard sufficient to satisfy constitutional requirements.

We also find the appellants' remaining arguments to be without merit.

Consequently, the trial court's final judgment upholding Section 73 of Chapter 88-1, as amended by Sections 39 and 41 of Chapter 88-277, and codified as Section 766.314, Florida Statutes (1989), against the various constitutional challenges raised by appellants is affirmed.

ZEHMER and MINER, JJ., CONCUR.

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA.

DR. JAMES T. MCGIBONY, DR. JOSEPH C. VON THRON, DR. MARK D. ZIFFER AND DR. WILLIAM BARFIELD, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PLAN, FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION, TOM GALLAGHER, in his official capacity as the head of THE FLORIDA DEPARTMENT OF INSURANCE and LAURENCE GONZALEZ, in his official capacity as the head of the FLORIDA DEPARTMENT OF PROFESSIONAL REGULATION,

Defendants,

and

JAMES F. COY, M.D., SIDNEY R. STEINBERG, M.D., and CLAUDE A. BOYD, M.D., on behalf of themselves and all others similarly situated,

Plaintiffs,

CASE NO. 88-4615

CASE NO. 89-1008

vs.

FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PLAN, FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION, TOM GALLAGHER, in his official capacity as the head of THE FLORIDA DEPARTMENT OF INSURANCE,

Defendants.
_____/

FINAL ORDER

This matter came before the undersigned Circuit Judge for final hearing on June 13, 1989. The Plaintiffs, physicians licensed by the Florida Department of Professional Regulation, have brought an attack alleging Section 73 of Chapter 88-1, Laws of Florida, as amended by Sections 39 and 41 of Chapter 88-277, Laws of Florida, and codified at Section 766.314, Florida Statutes (1988 Supp.), is unconstitutional and violates the due process and equal protection clauses of the United States and Florida Constitutions as well as Article VII, Sections 1 and 10 of the Florida Constitution and the privileges and immunities clause of the United States Constitution. Having heard the testimony of witnesses, reviewed the evidence and proposed final orders, the Court finds:

A. BACKGROUND

In 1986, the Legislature created the Academic Task Force for the Review of the Insurance and Tort Systems. *See* Affidavit of Carl S. Hawkins, attached to Defendant Florida Birth-Related Neurological Injury Compensation Association's Response to Motion for Summary Judgment. The legislature directed the Task Force to study the problems associated with Liability insurance in Florida and report recommendations for change to the Legislature by March 1, 1988. As the Task Force began its investigation, medical malpractice quickly emerged as the most visible and likely the most serious problem within the tort and insurance systems.

The Task Force held fourteen public hearings and gathered extensive technical and statistical data. In July 1987, Governor Bob Martinez informed the Task Force that a special legislative session would probably be held in the fall and requested the Task Force assist the Legislature in any way possible during this special session. On August 14, 1987, the Task Force published a *Preliminary Fact Finding Report on Medical Malpractice* to assist the Legislature during the upcoming special session. A copy of this report was admitted as a defense exhibit in this cause.

The findings of the Task Force included, in part,:

a) Affordability. The cost of medical malpractice insurance has increased dramatically during the last eight years, with the largest share of this increase coming during the past two years.

b) Cause of Price Increase. The primary cause of increased malpractice premiums has been the substantial increase in lost payments to claimants.

c) Frequency of Claims Payments. The frequency of claims payments has increased 4.6% per year since 1975, but only 1.8% when adjusted for the increase in population.

d) Variations Among Medical Specialities. There are considerable variations both in frequency and severity of paid claims among medical specialities. Obstetrics and gynecology account for 13.6% of all paid claims, while specialties such as endocrinology, psychiatry, and thoracic surgery each account for less than 2% of all paid claims.

e) Effects of Malpractice Liability upon Health Services in the Medical Profession. Medical malpractice insurance problems have many effects on health services in the medical profession, including adverse financial effects on physicians, increased health care provider fees, and potentially deleterious alterations of health care delivery patterns.

See Preliminary Fact Finding Report on Medical Malpractice, August 14, 1987, Pages 3-5 and 236-254.

With respect to obstetrics and gynecology, the Task Force made, in part, the following findings:

a) For the period 1975 to 1986 and particularly for the years 1982 to 1986, obstetrics and gynecology ranked highest in total paid claims.

b) The spread between malpractice premium insurance rates for obstetricians and family physicians has increased significantly between 1983 and 1987.

c) Between 1975 and 1986, the average claims cost for obstetricians rose 1,029%, from $14,173 to $160,555.

d) Since the 1971 to '72 policy year and through the 1986 to '87 policy year, the percentage of an OB/GYN's gross revenues devoted to malpractice insurance premiums has increased from 4.2% to 23.1%; this percentage for all physicians rose less than half as much, from 3.6% to 11.6%.

Id. at 46, 48, 103, 105, 128, 130, and 237.

In November 1987, the Task Force published its *Medical Malpractice Recommendations* and furnished them to the Legislature. A copy of these recommendations was also admitted as a defense exhibit. Among the major recommendations was a proposal that the Legislature enact a no-fault system for birth-related neurological injuries to provide for the long-term care and treatment of certain neurologically injured infants. *See Medical Malpractice Recommendations,* November 6, 1987, Page 1, and 30-34.

The Legislature followed the Task Force's recommendations and during its Special Session, in February 1988, enacted Chapter 88-1, Laws of Florida. A portion of Chapter 88-1 created the Florida Birth-Related Neurological Injury Compensation Plan (hereafter the Plan). The Plan provides a no-fault compensation system for certain neurologically injured infants. The Legislature developed a financing scheme, found in Section 73 of Chapter 88-1,

as amended by Sections 39 and 41 of Chapter 88-277, Laws of Florida, and codified as Section 766.314, Florida Statutes (1988 Supp.), to pay for the Plan which calls for payments from hospitals, physicians, the Insurance Commissioner's Regulatory Trust Fund and, in certain circumstances, casualty insurance carriers. With respect to physicians, those who participate in the Plan pay an initial and annual assessment of $5000; non-participating physicians pay an initial and annual assessment of $250. It is this section that Plaintiffs attack. The section provides for the payment and collection of assessments necessary to operate the Plan and compensate victims.

Plaintiffs, McGibony, et al., are licensed Florida Physicians who do not practice obstetrics and who mut pay the $250 assessment. One of these physicians resides in Georgia. Plaintiffs were granted certification to represent the class of all non-participating physicians and osteopathic physicians who must pay the $250 assessment.

Plaintiffs, Coy, et al., are Florida licensed physicians who reside out-of-state and who must pay the $250 assessment. Because the issues raised by these Plaintiffs were nearly identical to the claims made by Plaintiffs, McGibony, et al., these matters were consolidated for trial.

Defendants include the Association, which administers the Plan; the Commissioner of Insurance, and the Secretary of the Department of Professional Regulation.

All Plaintiffs sought to have the portion of Section 766.314 which requires the payment of the $250 assessment declared unconstitutional and Defendants enjoined from implementing or enforcing its provisions.

B. Summary of the Parties' Argument

Plaintiffs claim the assessment provision is arbitrary, unreasonable and therefore unconstitutional. Specifically, Plaintiffs alleged the following:

1) The assessment is in the nature of a tax;

2) The assessment violates the due process clause because there is no rational basis for the imposition of a "tax" on non-participating physicians;

3) The assessment violates the equal protection clause because it singles out non-participating physicians from the rest of the general population to pay a "tax" which benefits a group other than the physician;

4) The assessment improperly pledges the credit of the state and improperly delegates the power to tax to the Department of Insurance because the funds derived from the assessment are paid to a "private" entity and because the Commissioner of Insurance has the authority to levy assessments to maintain the fund on an actuarily sound basis;

5) The assessment discriminates against out of state physicians by making them pay the "tax" when they cannot receive any benefits from the plan.

The defendants argued:

1) Legislative enactments are presumed valid; all doubts should be resolved in favor of

constitutionality and if any possible interpretation exists to uphold the constitutionality of the statute, the court should follow that interpretation;

2) The assessment may in fact be a tax; however, the Legislature has broad discretion in creating revenue raising schemes;

3) The statute is a valid exercise of the police power; it is rationally related to a legitimate state purpose and should be upheld unless clearly arbitrary and unreasonable;

4) The statute does not improperly pledge the credit of the state or delegate the state's power to tax to the Department of Insurance because it contains sufficient guidelines to insure fairness and prevent abuse; and

5) The statute does not discriminate against out-of-state physicians; all physicians who do not participate in the plan must pay the assessment regardless of where they live.

To determine the constitutionality of the statute, the court must decide whether the Legislature's decision to require all physicians to help pay for the plan was a reasonable one. If it was, the statute is deemed constitutional.

C. Judicial Inquiry and the Plaintiffs' Burden of Proof

Statutes are presumed constitutional and should be so construed. *Gulf Stream Park Racing Association v. Department of Business Regulation,* 441 So.2d 627 (Fla. 1983). If reasonably possible and consistent with constitutional rights, courts should resolve all doubts regarding

the validity of the statute in favor of its constitutionality. *Falco v. State,* 407 So. 2d 203 (Fla. 1981). This is because the state is considered the primary judge of regulation in the interest of public safety and welfare. *Powell v. State,* 345 So.2d 724 (Fla. 1977).

A party challenging the statute has the burden of establishing its invalidity; *Peoples Bank of Indian River County v. State, Department of Banking and Finance,* 395 So.2d 521 (Fla. 1981); and such invalidity must be shown beyond a reasonable doubt. *Robinson v. Florida Drycleaning and Laundry Board,* 194 So. 269 (Fla. 1940); *Metropolitan Dade County v. Bridges,* 402 So.2d 411 (Fla. 1981).

If the constitutionality of a statute is questioned and if it is reasonably susceptible of two interpretations, by one of which it will render the statute unconstitutional and by the other valid, the court must adopt the interpretation which will render the statute valid. *Department of Insurance v. Southeast Volusia Hospital District,* 438 So.2d 815 (Fla. 1983); *Florida State Board of Architecture v. Wasserman,* 377 So.2d 653 (Fla. 1979). Furthermore, where a factual predicate is necessary to the validity of an enactment, it is to be presumed that the necessary facts were before the Legislature at the time of the enactment. *Wasserman; Cliento v. State,* 377 So.2d 663 (Fla. 1979).

The principle noted in *Wasserman* and *Cliento* was enunciated earlier in *State v. Bales,* 343 So.2d 9 (Fla. 1977). *Bales* involved a challenge to the constitutionality of a statute which required persons who performed massage for a fee to be licensed by the state. The court upheld the regulation and stated:

> . . . any legislative enactment carries a strong presumption of constitutionality, including a rebuttable presumption of the existence of necessary factual support in its provisions. *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194, 209, 210, 55 S.Ct. 187, 79 L.Ed. 281 (1934). If any state of facts, known or to be assumed, justify the law, the court's power of inquiry ends. *United States v. Carolene Products Co.*, 304 U.S. 144, 154, 58 S.Ct. 778, 82 L.Ed. 1234 (1938). Questions as to wisdom, need or appropriateness are for the Legislature. *Olsen v. State of Nebraska, ex rel. Western Reference & Bond Ass'n*, 313 U.S. 236, 246, 61 S.Ct. 862, 85 L.Ed. 1305 (1941).

In *Fulford v. Graham*, 418 So.2d 1204 (Fla. 1st DCA 1982), the constitutionality of regulations concerning salt-water fisherman was challenged. The court upheld the regulations, citing *Bales*, and noted "the evidence adduced at trial, including the general comments of experts who testified, does not serve as a sufficient basis to declare the acts unconstitutional in light of the presumption of constitutionality." Id. at 1205.

Plaintiffs have asked the court to review the Legislature's choice of a financing method for the Florida Birth-Related Neurological Injury Compensation Plan. That choice came to the court cloaked in a presumption of validity. All doubts regarding its constitutionality must be resolved in favor of constitutionality. If different reasonable interpretations exist where one would conclude the financing scheme was unfair or unwise, but another would conclude the scheme was reasonable and rational, the latter interpretation must prevail. Further, if a factual predicate is necessary to render the Legislature's choice a

reasonable one, or a constitutional one, this court must presume that predicate was before the Legislature when it acted.

Here, the record was replete with the factual information presented to and considered by the Legislature when it enacted this legislation. The Academic Task Force documented and reported the existence and effect of the malpractice insurance crisis. The crisis was far reaching and affected health care providers, insurance carriers and ordinary citizens. The legislation at issue was an attempt to deal with that crisis. The financing scheme chosen by the Legislature to assure the financial viability of the plan is not, as will be further explained, so far afield or so infirm as to overcome the presumption in favor of constitutionality that attaches to any statute.

D. The assessment is Constitutional Even if it is a Tax

The assessment imposed by the Legislature may be a tax. As a portion of the funding base for the compensation program created by Section 766.301, et seq., Florida Statutes (1988 supp.), the excise levied on the licenses of all physicians authorized to practice in Florida is primarily a revenue mechanism. As such, it may properly be classified as a tax. *Bateman v. City of Winter Park*, 37 So.2d 362 (Fla. 1948).

In *Eastern Airlines, Inc. v. Department of Revenue*, 455 So.2d 311 (Fla. 1984), the Florida Supreme Court established the standard of review by which tax legislation, challenged on the same constitutional grounds raised by Plaintiffs, is to be evaluated:

> When the state Legislature, acting within the scope of its authority, undertakes to exert the taxing power, every presumption in favor of the validity of its action is indulged. Only clear and demonstrated usurpation of power will authorize judicial interference with legislative action. *Walters v. City of St. Louis*, 347 U.S. 231, 74 S.Ct. 505, 98 L.Ed. 660 (1954). In the field of taxation particularly, the legislature possesses great freedom in classification. The burden is on the one attacking the legislative enactment to negate every conceivable basis which might support it. *Madden v. Kentucky*, 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590 (1940); *Just Valuation & Taxation League, Inc. v. Simpson*, 209 So.2d 229, 323 (Fla. 1968). The state must, of course, proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. *Department of Revenue v. AMREP Corp.*, 358 So.2d 1343, 1349 (Fla. 1978). A statute that discriminates in favor of a certain class is not arbitrary if the discrimination is founded upon a reasonable distinction or difference in state policy. *Allied Stores v. Bowers*, 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed.2d 321 (1959).

A tax may even be so high as to restrict or even possibly destroy particular occupations without violating the due process or equal protection clause. A tax will not be nullified unless it is palpably arbitrary or grossly unequal in its application. *Pittsburg v. Alco Parking Corporation*, 417 U.S. 369 (1974). The presumption of constitutionality of a license tax can be overcome "only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes," *Madden v. Kentucky*, 309 U.S. 83 at 88 (1940), and even if everyone subject to a tax is not taxed

equally, that in and of itself does not make taxation arbitrary or violative of the equal protection clause. *Smith v. Department of Revenue,* 512 So.2d 1008 (Fla. 1st DCA 1987).

Furthermore, the Legislature is free to tax the licenses of occupations or businesses for regulatory and revenue-raising purposes. *Young v. Thomas,* 17 Fla. 169 (1879); *City of Jacksonville v. Ledwith,* 7 So. 885 (Fla. 1890). This was more fully discussed in *State ex rel. Bonsteel v. Allen,* 91 So. 104 (Fla. 1922), when the court held:

> While it is within the power of the Courts to declare Laws levying license taxes void because of the unreasonable and arbitrary exercise of the state's power either in the classification or in fixing the amount of the license, such power will not be exercised unless the amount of the license tax is so great, or the classification so palpably arbitrary as to be beyond the necessities for the legislation, or equivalent to an impairment of the constitutional rights of property, or tend to prevent a great number, if not all persons, from pursuing otherwise lawful occupations which do not impair public safety, public health or destroy property. Id. at 105.

The assessment at issue here meets none of the criteria for finding a tax unconstitutional as articulated in *Bonsteel* or the cases that followed it. The amount of the license tax is not so great, nor is the classification so palpably arbitrary, as to be beyond necessity for the legislation. Plaintiffs are simply one of five contributing funding sources to the Plan, and no evidence was presented at

the final hearing which demonstrated that the proportionate share contributed by Plaintiffs is grossly unequal or discriminatory.

The assessment is not equal to an impairment of the constitutional rights of property and, from the evidence considered or presented in this cause, does not tend to prevent a great number of persons from pursuing the medical profession.

Plaintiffs claim that the tax is unconstitutional because they receive no direct benefit is without merit. There is no constitutional requirement that a person subject to a tax must receive a direct benefit in return for the money contributed. Rather, the legitimacy and constitutionality of a tax is determined by the criteria discussed above.

E. The Statute is a Valid Exercise of the Police Power

Generally, the exercise of the state's police power must relate to the health, safety and welfare of the public and may not be arbitrarily and capriciously applied. *Graham v. Estuary Properties, Inc.*, 399 So.2d 1374 at 1379 (Fla. 1981). A reviewing court such as this one will not usually disturb legislative discretion in classifying the subject of police regulation unless it is wholly without a reasonable basis; such a classification will not be declared unreasonable solely because opinions differ as to what should have been included or omitted in the legislation. *Barts v. State*, 447 So.2d 410 at 411 (Fla. 1st DCA 1984). Thus, as long as a classificatory scheme chosen by the

Legislature rationally advances a legitimate governmental objective, the courts will disregard the method used in achieving the objective and the challenged enactment will be upheld. *Sasso v. Ram Property Management,* 431 So. 2d 204 (Fla. 1st DCA 1983), *aff'd,* 452 So.2d 932 (Fla. 1984), appeal dismissed, 469 U.S. 1030 (1984). A court must not be concerned with whether the particular legislation in question is the most prudent choice, or is the perfect panacea, to cure the ill or achieve the interest intended; if there is a legitimate state interest which the Legislature aims to effect, and if the legislation is a reasonably related means to achieve the intended end, it will be upheld. *State v. Walker,* 444 So.2d 1137 at 1139 (Fla. 1st DCA 1984).

The legitimate state interests served by the legislation are clearly set forth in the preamble to Chapter 88-1, Laws of Florida:

> WHEREAS, the Legislature finds that there is in Florida a financial crisis in the medical liability insurance industry, and
>
> WHEREAS, it is the sense of the Legislature that if the present crisis is not abated, many persons who are subject to civil actions will be unable to purchase liability insurance, and many injured persons will therefore be unable to recover damages for either their economic losses or their non-economic losses, and
>
> WHEREAS, the people of Florida are concerned with the increased cost of litigation and the need for a review of the tort and insurance laws, and
>
> WHEREAS, the Legislature believes that, in general, the cost of medical liability insurance is

excessive and injurious to the people of Florida and must be reduced, and

WHEREAS, the Legislature finds that there are certain elements of damage presently recoverable that have no monetary value, except on a purely arbitrary basis, while other elements of damage are either easily measured on a monetary basis or reflect ultimate monetary loss, and

WHEREAS, the Legislature desires to provide a rational basis for determining damages for non-economic losses which be awarded in certain civil actions, recognizing that such non-economic losses should be fairly compensated and that the interests of the injured party should be balanced against the interests of society as a whole, in that the burden of compensation for such losses is ultimately borne by all persons, rather than the tortfeaser alone, and

WHEREAS, the Legislature created the Academic Task Force for Review of the Insurance and Tort Systems which has studied the medical malpractice problems currently existing in the State of Florida, and

WHEREAS, the Legislature has reviewed the findings and recommendations of the Academic Task Force relating to medical malpractice, and

WHEREAS, the Legislature finds that the Academic Task Force has established that a medical malpractice crisis exists in the State of Florida which can be alleviated by the adoption of comprehensive legislatively enacted reforms, and

WHEREAS, the magnitude of this compelling social problem demands immediate and dramatic legislative action, NOW, THEREFORE. . . .

Given this strong pronouncement of compelling social need and the inherent authority and discretion of the Legislature to address such needs, Plaintiffs simply did not convince this court that the Legislature's decision to include them in the financing scheme of the Plan was "wholly without a reasonable basis."

(1) Due Process

The Legislature has broad discretion in determining necessary measures for the protection of the public health, safety and welfare and when the Legislature acts in these areas, a court may not substitute its judgment for that of the Legislature. *State v. Thomas,* 428 So.2d 327 at 331 (Fla. 1st DCA 1983). In *Department of Insurance v. Dade County Consumer Advocates Office,* 492 So.2d 1032 (Fla. 1986), the Supreme Court noted the narrow grounds upon which a successful due process challenge can be waged: "When considering the validity of a legislative enactment, this Court may overturn the act on due process grounds only when it is clear that it is not in any way designed to promote the people's health, safety or welfare or that the statute has no reasonable relationship to the state's avowed purpose."

Plaintiffs have conceded the Plan as a whole served legitimate state interests. *See* Plaintiffs' Motion for Summary Judgment, Page 7. However, Plaintiffs complained that the decision to require them to contribute financially to the Plan was unreasonable and violative of the due process clause because Plaintiffs bore no more relationship to the goals of the plan than a member of the general public. Specifically, Plaintiffs alleged the assessment is

unconstitutional because physicians who are required to pay it do not obtain benefits from the Plan. This is so, they argued, because physicians who do not practice obstetrics and gynecoloy are not permitted to practice obstetrics within hospital settings and, since they cannot practice obstetrics, they do not receive the benefits otherwise provided to participating physicians.

The lack of participation and coverage in the face of the required fees and possible assessments formed the primary basis for Plaintiffs' constitutional attack on the statute. This position was entirely without merit.

The Plan bears a reasonable relationship to its stated purposes, by insuring the availability of obstetrical care to Florida citizens and by providing for the care of Florida children who suffer birth-related neurological injuries, and Plaintiffs bear a reasonable relationship to the Plan. As documented and reported by the Academic Task Force, physicians play a critical role in the delivery of health care services and all physicians were adversely affected by the medical malpractice crisis which engulfed this state and severely disrupted the delivery of health care services and the day-to-day operations of hospitals throughout the state.

The Defendant's witness, Mr. Jay Weinstein, an expert in hospital administration, provided unrefuted testimony regarding the extent and effects of the disruption in the delivery of health care services. *See* Transcript of final hearing, pages 71-79, 81-85.

For example, various critical services including emergency room, trauma, obstetrical, and neurosurgery were

reduced or eliminated and, consequently, remaining services were overloaded. Referrals among physicians were reduced and hospitals found it difficult to recruit and maintain staff. Access to major health care services was limited and, as a result, the relationship between the public and the medical profession deteriorated.

The effects of the disruption of obstetrical services are particularly severe. When those services are not provided, the emergency room staff is overloaded and "the system is pushed to the wall." Negative economic consequences befall the hospital as well, since mothers are a primary source of patient referrals for physicians in all specialties.

The devastating effects of the disruption in the delivery of obstetrical services were confirmed even by Plaintiffs' expert, Dr. Masterson, who, during questioning, testified:

Question: "Hypothetically, let's assume for a moment that all of the obstetrical physicians on that staff, because of malpractice premiums and because of – frankly, because of the problems associated with malpractice, including having to come to the courthouse and testify, and so forth, decided they had had enough. And they had decided that they have had enough so much that they decided to stop either treating indigent patients, which are sometimes a common problem pregnancy, or otherwise just stop practicing OB. Based on that hypothetical I gave you and your small knowledge of Jackson, would that have an effect on that hospital's operations?"

Answer: "It would be disastrous."

Question: "That disaster would permeate that hospital; wouldn't it?"

Answer: "I presume, yes."

See Transcript of final hearing, page 35.

Additionally, hospitals which do not provide obstetrical services are also negatively impacted by the crisis as they struggle to refer their patients to other, unfamiliar facilities.

Conversely, when the malpractice crisis is lessened and health care services can be delivered smoothly and efficiently, benefits will be seen and felt throughout the health care industry.

For example, access to health care services will be expanded as services which were eliminated or reduced during the crisis are again offered. Emergency rooms and trauma centers will re-open. Patient referrals will increase and physicians will be able to practice in pleasant and full service facilities. Essentially, the negative consequences of the malpractice crisis will be alleviated.

In light of these facts, Plaintiffs' claim that they are not related to the goals of this plan cannot be sustained. Health care services are delivered by a team of providers, all of whom interact and depend on one another. The malpractice crisis severely disrupted the delivery of health care services and all members of the "team" suffered. Since one of the goals of the Plan is to help alleviate the crisis and permit the efficient delivery of health care services by all members of the team, Plaintiffs are undeniably related to at least one of the goals of the Plan and stand to benefit from its realization. This act is not a

cure all, but will be a major contribution to the cure. Thus, the Legislature's decision to require Plaintiffs to contribute to the Plan was not wholly unreasonable, arbitrary, or capricious.

The Legislature has chosen a similar financing scheme in regard to another statutorily created plan, the Public Medical Assistance Trust Fund, found in Sections 409.266(2)(3), Florida Statutes, and related to the provisions of Section 395.101, Florida Statutes. *See* Transcript of final hearing, pages 109-11, 126. Under the provisions of the statutes which govern this trust fund, hospitals contribute to a fund to pay for indigent care provided by hospitals around the state whether or not the hospitals themselves receive any benefits from the fund. In other words, the idea of requiring health care providers to contribute to a fund to "benefit" or pay for services rendered by others is nothing new. This fact supports the reasonableness of the Legislature's action in enacting the legislation at bar.

Perhaps there was another way to finance the plan; perhaps the Legislature could have chosen not to act at all. However, this court cannot and will not be concerned with whether the Legislature's choice was the most prudent or the most effective way to address the ill perceived. That is not the issue before this court. As long a the financial scheme chosen by the Legislature rationally advances a legitimate government objective, as so found today, this court will not second guess the method used in achieving the objective.

(2) Equal Protection

To comply with the requirements of the equal protection clause, statutory classifications must be reasonable and not arbitrary and all persons in the class must be treated alike. *Lasky v. State Farm Insurance Company,* 296 So.2d 9 (Fla. 1974). The regulation of the practice of medicine does not involve a fundamental right or suspect class for purposes of the equal protection analysis, so the rational basis analysis applies. *Woods v. Holy Cross Hospital,* 591 F.2d 1164 (C.A. Fla. 1979).

The equal protection clause requires that a statutory line which draws distinctions and classifications be a rational one, bearing some rational relationship to a legitimate state purpose. *Patch Enterprises, Inc. v. McCall,* 447 F.Supp. 1075 (D.C. Fla. 1978). The equal protection clause does not require that the state choose between attacking every aspect of a problem or not attacking a problem at all; it is enough that the state's action be rationally based and free from invidious discrimination. *Ivy Steel and Wire Company, Inc. v. City of Jacksonville,* 401 F.Supp. 701 (M.D. Fla. 1975). The burden is on the party challenging a statute or regulation on equal protection grounds to show there is no conceivable factual predicate which would rationally support the classification under attack. The rational basis for the governmental objective may be identified by statements of intent from legislative reports and journals, inferences by reference to similar legislation or actions taken by the legislative body, or from legal arguments of government before the court. *Sasso v. Ram Property Management,* 431 So.2d 204 at 216 (Fla. 1st DCA 1983). Where the challenging party fails to meet such a burden, the statute or regulation must be sustained. *The*

Florida High School Activities Association, Inc. v. Thomas by and through Thomas, 434 So.2d 306 (Fla. 1983).

For the reasons already discussed, Plaintiffs' equal protection claim also cannot prevail. Plaintiffs have not demonstrated that the Legislature's classification was arbitrary or unreasonable or that there was no conceivable factual predicate to support the classification. To the contrary, the record established the legitimate public purposes served by the Plan, the Plaintiffs' relationship to the goals of the Plan, and the reasonableness of the classifications within the financing scheme. The method chosen by the Legislature to insure the financial viability of the Plan was reasonable and was not violative of the equal protection clause.

F. The Assessment Does Not Improperly Pledge the Credit of the State or Delegate the State's Taxing Authority to the Commissioner of Insurance

Plaintiffs argues the imposition of the assessment contravenes Article VII, Section 10 of the Florida Constitution because the payments are made to the Florida Birth-Related Neurological Injury Compensation Association (hereafter the Association), which Plaintiff contends is a private entity. Plaintiffs' argument misconstrued the intent of the prohibition against pledging the state tax credit to aid a private entity.

Article VII, Section 10, provides, in pertinent part:

> Neither the state nor any county, school district, municipality, special district, or agency of any of them, shall become a joint owner with, or stock holder of, or give, lend or use its taxing power

> or credit to aid any corporation, association, partnership or person.

Although the Association which administers the Plan is not an agency, board, or commission, it is not private in nature. The Association is exclusively a creature of the statute, formed solely to carry out the public purposes set forth by the Legislature. Payment of a state excise tax raised for a public purpose into a non-state entity has been accepted by the Florida Supreme Court. *C.V. Floyd Fruit Company v. Florida Citrus Commission,* 175 So. 248 (Fla. 1937). There is no "benefit or aid" inuring to the Association by virtue of its being the depository or manager of the Plan's various funds. To the contrary, all benefits that may arise from the Plan are for the general public, the infants whose injuries will be compensated, and the health care industry as a whole, including the Plaintiffs. When the Legislature makes a determination of public purposes, such as those purposes served by the legislation here, the party challenging that determination must show that such a determination was so clearly wrong as to be beyond the power of the Legislature. *State v. Orange County Industrial Development Authority,* 417 So.2d 959, 1962 (Fla. 1982). See also, *State v. Osceola County Industrial Development Authority,* 424 So.2d 739 (Fla. 1982). The Plaintiffs in this cause did not make such a showing.

Plaintiffs also contended that the provisions of the statute which grant to the Commissioner of Insurance the ability to levy additional assessments constitute an illegal delegation of the power to tax. This contention was without merit.

The provisions of Sections 766.314(7) and 766.315(5)(a)(c), Florida Statutes, (1988 Supp.), grant the Commissioner the authority to levy assessments to maintain the fund on an "actuarily sound basis" but only after an actuarial investigation has been completed.

The arguments raised by Plaintiffs in regard to this type of financing scheme have been addressed to, and disposed of by, the Florida Supreme Court. In *Department of Insurance v. Southeast Volusia Hospital District*, 438 So.2d 815 (Fla. 1983), the Supreme Court dealt with a challenge to the authority granted to the Commissioner of Insurance to levy assessments against members of the Florida Patient's Compensation Fund. The court found no improper delegation of authority and upheld the constitutionality of the statute. The court noted that "the crucial test in determining whether a statute amounts to an unlawful delegation of legislative power is whether the statute contains sufficient standards or guidelines to enable the agency and the courts to determine whether the agency is carrying out the Legislature's intent." The court then recognized that Florida courts have found the concept of actuarial soundness to be a meaningful standard and referred to Article X, Section 14, of the Florida Constitution which refers to a "sound actuarial basis." Article X, Section 14, Fla. Const., Id. at 819.

The court further found there was no unconstitutional delegation simply because the department of Insurance could determine the amount of the assessment. The legislature may delegate to authorized officials and agencies the authority to determine facts to which the established policies of the legislature are to apply. The question of determining when a deficit exists or not is a

technical issue of implementation and not a fundamental policy decision. Id. at 820.

The authority granted the Commissioner of Insurance to levy assessments as needed to maintain the (NICA) Plan on an actuarily sound basis satisfies the criteria set forth in *Southeast Volusia Hospital District* and does not constitute an unlawful delegation of the state's taxing authority.

The argument advanced by amicus curiae likewise fails when the provisions of Chapter 120, Florida Statutes, are considered. The Department's initial decision as to the amount of assessment to be levied, and the manner in which the assessment is distributed, constitutes "agency action", §120.52(2), Florida Statutes, giving rise to proceedings under §120.57, Florida Statutes.

As parties whose substantial interests are affected by the agency's free form action, amicus curiae, and others, will have an opportunity to present evidence and argument in a trial type hearing. *See McDonald vs. Department of Banking and Finance,* 346 So.2d 569 (Fla. 1st DCA 1977).

G. The Assessment Does Not Violate the Privileges and Immunities Clause of the United States or Florida Constitutions.

Finally, Plaintiffs alleged the assessment constitutes a violation of the privileges and immunities clause of the Florida and United States Constitutions. This argument was misplaced.

The singular goal of the privileges and immunities clause is to prohibit unequal treatment the citizens of one

state in favor of the citizens of another. The privileges and immunities clause "was designed to insure to a citizen of state A who ventures into state B the same privileges which the citizens of state B enjoy." *Toomer v. Witsell,* 334 U.S. 385 (1948).

As clearly stated in Section 766.314(b), Florida Statutes (1988 Supp.), all physicians licensed under Chapters 458 and 459 of the Florida Statutes are subject to the equal assessment of $250. The excise applies equally to residents and non-residents of the state. It has absolutely no relation to the residence of the licensee but, instead, is an assessment upon the privilege of holding the license which enables the licensee to practice medicine in the State of Florida. As such, it is constitutionally sound. *Winshare Club of Canada v. Department of Legal Affairs,* 14 FLW 179, Florida Supreme Court, Opinion filed April 6, 1989.

While the assessment at issue may appear more burdensome or offensive to Florida Licensed physicians who reside out-of-state and do not practice in the State of Florida, that perception is the result of the licensee's choice of residence and not as the result of any classification or special burden imposed by the statute.

CONCLUSION

In summary, this court recognizes and finds that statutes are presumed constitutional and any doubts regarding their validity should be resolved in favor of constitutionality. This court cannot substitute its judgment for that of the Legislature.

The financing scheme chosen by the Legislature to pay for the Florida Birth-Related Neurological Injury Compensation Plan is a valid exercise of the state's police power and is reasonably related to a legitimate governmental purpose. The assessment is not so oppressive or burdensome as to be unreasonable or arbitrary.

The statute contains sufficient guidelines to enable the Department of Insurance to levy assessments in a constitutional manner. The statute does not discriminate against out-of-state residents, since all licensed physicians, regardless of their residence, must pay an equal assessment.

Taken in their best light, Plaintiffs' complaints were primarily a disagreement with the Legislature's decision to fund the Plan through payments by physicians and others. Even if another financing method would have been better than the one chosen, such does not render this method unconstitutional. This court cannot inquire as to whether a legislative decision was the wisest or most effective but, rather, whether it was a reasonable one. The decision made by the Legislature in this instance was reasonable in light of the information before the Legislature and the severity of the problem it tried to address.

ORDERED AND ADJUDGED THAT:

Section 73 of Chapter 88-1, as amended by Sections 39 and 41 of Chapter 88-277, Laws of Florida, and codified at Section 766.314, Florida Statutes (1988 Supp.), is constitutional. Plaintiffs' request for relief is denied. The court retains jurisdiction regarding costs and fees.

DONE AND ORDERED this 12th day of September, 1989.

/s/ F.E. Steinmeyer, III
F.E. STEINMEYER, III
Circuit Court Judge

Copies furnished to the following:

F. Philip Blank, Esq.
Julie Gallagher, Esq.
Blank, Hauser & Amundsen
204-B Suth Monroe Street
Tallahassee, FL 32301

George Waas, Esq.
Department of Legal Affairs
The Capitol, Suite 1501
Tallahassee, FL 32399-1050

H. Reynolds Sampson, Esq.
Florida Department of Professional Regulation
1940 North Monroe Street
Tallahassee, FL 32399-0792

Peter D. Ostreich, Esq.
Florida Department of Insurance
412 Larson Building
Tallahassee, FL 32399-0300

Kent Masterson Brown, Esq.
First National Building
167 West Main Street
Lexington, Kentucky 40507

Donna Stinson, Esq.
The Perkins House
Suite 100
118 North Gadsden Street
Tallahassee, FL 32301

Robert J. Winicki, Esq.
Post Office Box 4099
Jacksonville, FL 32201

John Thrasher, Esq.
Florida Medical Association
760 Riverside Avenue
Jacksonville, FL 32304

Wilbur D. Brewton, Esq.
Kenneth D. Goldberg, Esq.
225 South Adams Street
Suite 250
Tallahassee, FL 32301

Neil Butler, Esq.
1102 North Gadsden Street
Post Office Box 839
Tallahassee, FL 32302

Patricia Malono, Esq.
101 North Monroe Street
Suite 950
Post Office Box 229
Tallahassee, FL 32302

Thomas J. Maida, Esq.
101 North Monroe Street
Suite 950
Post Office Box 229
Tallahassee, FL 32302

SUPREME COURT OF FLORIDA

WEDNESDAY, APRIL 22, 1992

JAMES F. COY, M.D., et al.,	*	CASE NO. 76,565
Petitioners,	*	District Court of Appeal, 1st District – Nos. 89-2569 & 89-2593
v.	*	
FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PLAN, et al.,	*	
Respondents.	*	

* *

Petitioner's Motion for Rehearing filed in the above cause is hereby denied.

SHAW, C.J., OVERTON, McDONALD, GRIMES and HARDING, JJ., concur BARKETT and KOGAN, JJ., dissent

[SEAL]

A True Copy
TEST:

by:
Deputy Clerk
Sid J. White
Clerk, Supreme Court

TC

cc: Hon. Jon S. Wheeler, Clerk
Hon. Paul F. Hartsfield, Clerk
Hon. Ted Steinmeyer, Judge
Kent Masterson Brown, Esquire
Donna H. Stinson, Esquire
Wilbur E. Brewton, Esquire
J. Riley Davis, Esquire
George L. Waas, Esquire
Thomas J. Maida, Esquire
Patricia H. Malono, Esquire
William H. Adams, III, Esquire
Robert J. Winicki, Esquire
John E. Thrasher, Esquire

Supreme Court, U.S.
FILED
AUG 20 1992
OFFICE OF THE CLERK

No. 92-136

In The

Supreme Court of the United States

October Term, 1992

DR. JAMES T. McGIBONY, JAMES F. COY, M.D., et al.,

Petitioners,

v.

FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PLAN, et al.,

Respondents.

Petition For Writ Of Certiorari To The Florida Supreme Court

RESPONDENTS' BRIEF IN OPPOSITION

*WILBUR E. BREWTON
J. RILEY DAVIS
TAYLOR, BRION, BUKER & GREENE
116 South Monroe Street
Post Office Box 11189
Tallahassee, Florida 32302-3189
(904) 222-7717

Attorneys for Respondents

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Respondents do not agree with petitioners' characterization of the question presented for review. Instead, it is respondents' position that the following question would be presented for review before this court:

> DO THOSE SECTIONS OF § 766.314, FLA. STAT., PROVIDING FOR THE ASSESSMENT OF ALL FLORIDA LICENSED PHYSICIANS NOT DIRECTLY PARTICIPATING IN THE PLAN, VIOLATE THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

PARTIES TO THE PROCEEDINGS IN THE SUPREME COURT OF FLORIDA

Respondents accept the list of parties to the proceedings in the Supreme Court of Florida as delineated by the petitioners.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS IN THE SUPREME COURT OF FLORIDA	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED	1
STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
WHY THE WRIT SHOULD BE DENIED	3
CONCLUSION	9

TABLE OF AUTHORITIES

Page

CASES

Department of Insurance v. Southeast Volusia Hospital District, 438 So.2d 815 (Fla. 1983), appeal dismissed, 466 U.S. 901, 104 S.Ct. 1673, 80 L.Ed. 2d 149 (1984) 3

Easter Airlines, Inc. v. Department of Revenue, 455 So.2d 311 (Fla. 1984) 2, 3, 4, 8

STATUTES

Chapter 458 6

Chapter 459 6

§766.314(4), Fla. Stat. 6

§766.314(4)(a), Fla. Stat. 6

§766.314(5)(b) 6

§766.314(7)(a) 6

No. 92-136

In The

Supreme Court of the United States

October Term, 1992

DR. JAMES T. McGIBONY, JAMES F. COY, M.D., et al.,

Petitioners,

v.

FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PLAN, et al.,

Respondents.

Petition For Writ Of Certiorari To The Florida Supreme Court

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

Respondents accept the recitation by petitioners of the opinions rendered below and the cites thereto.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Respondents accept petitioners' statement as to the grounds on which the jurisdiction of this court is invoked.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Respondents accept the recitation by the petitioners of the statutory and constitutional provisions involved.

STATEMENT OF THE CASE

Respondents accept the statement of the case as set forth by the petitioners, except as clarified and/or modified herein.

The assessment statutes in question were challenged in the trial court as violating the petitioners' rights under the equal protection clauses of the United States and Florida Constitutions. The trial court, while affirming the constitutionality of the challenged statutes under the equal protection clauses of both the United States and Florida Constitutions, did not discuss, in detail, the federal equal protection constitutional issue. (Petitioners' Appendix, Pages A-25-A-53). Instead, the constitutionality of the challenged statutes was upheld primarily upon the rationale espoused by the Florida Supreme Court in *Easter Airlines, Inc. v. Department of Revenue,* 455 So.2d 311 (Fla. 1984). The Florida First District Court of Appeal, (the intermediary appellate court in Florida), affirmed the decision of the trial court. Again, the District Court of Appeal did not discuss at all the federal constitutional equal protection issues, but instead affirmed the trial court's decision based upon the rationale of the Florida Supreme Court in *Eastern Airlines, Inc., v. Department of Revenue,* supra. In addition, the decision of the trial court was upheld because of the Florida Supreme

Court's holding in *Department of Insurance v. Southeast Volusia Hospital District*, 438 So.2d 815 (Fla. 1983), appeal dismissed, 466 U.S. 901, 104 S.Ct. 1673, 80 L.Ed. 2d 149 (1984). (Petitioners' Appendix, pages A-17-A-24).

The Supreme Court of Florida upheld the constitutionality of the challenged statutes on the basis of the court's decision in *Eastern Airlines, Inc. v. Department of Revenue*, supra, by declaring and reaffirming that in determining whether a tax statute in Florida violates the equal protection clause of the Florida Constitution, Florida follows a "rational basis" standard for weighing the constitutional challenge. The court specifically found that the challenged statutes did not violate the equal protection clause of the Florida Constitution (Article I, Section 2). The court did not rule on the constitutionality of the statute under the equal protection clause of the United States Constitution, although the Florida Supreme Court relied upon rulings of the United States Supreme Court in rendering its decision in *Eastern Airlines, Inc. v. Department of Revenue*, supra.

WHY THE WRIT SHOULD BE DENIED

It is the petitioners' position that this court should accept this case for review and issue its writ of certiorari because the Florida appellate courts have decided an important question of federal constitutional law that has not been decided or settled by this court, namely whether the equal protection clause of the Fourteenth Amendment of the United States Constitution is violated by the imposition of a "status tax." It is the petitioners' position that

the Florida Supreme Court decision allows the State of Florida to tax a person's status in life without a proper reason. Such is not the effect of nor the decision of the Florida Supreme Court.

The Florida Supreme Court carefully considered the petitioners' argument challenging the constitutionality of the subject assessment statutes, but found that the assessments against the non-participating physicians constitute a "tax" within the meaning of Florida law and that the challenged statutes met the standard for tax statutes established in *Eastern Airlines, Inc. v. Department of Revenue,* supra.

The Florida Supreme Court set out the test established in the *Eastern Airlines* case for gauging the validity of a taxing statute and determined that the test as set forth in the *Eastern Airlines* case provides for the "rational basis" standard for weighing claims that a statute violates the equal protection clause of the Florida Constitution. Applying the rational basis test to this case, the Florida Supreme Court concluded that there was a rational basis for the statutory assessment of all physicians even though these physicians do not practice obstetrics. The court recited verbatim from the comprehensive findings of fact of the trial court that all physicians play a critical role in the delivery of health care services and that all physicians were adversely affected by the medical malpractice crisis in Florida which had engulfed the State of Florida and had severely disrupted the delivery of health care services and the day and day operations of hospitals throughout the State. The trial court had found that the effects of the disruption of obstetrical services was particularly severe. The court recited further the findings of the

trial court that when obstetrical services are disrupted, the emergency room of hospitals is overloaded and "the system is pushed to the wall." The final conclusion was that the disruption of obstetrical services would be disastrous to the operation of hospitals in Florida.

The Florida Supreme Court concluded that there was competent substantial evidence to support the trial court's findings and specifically the finding that:

> "Conversely, when the malpractice crisis is lessened and health care services can be delivered smoothly and efficiently, benefits will be seen and felt throughout the health care industry."

The Florida Supreme Court recognized that health care services are delivered by a team of providers, all of who interact and depend upon one another, and that a breakdown in one area of service impacts the other areas. Accordingly, the Florida Supreme Court concluded that all physicians, regardless of whether they practice obstetrics, derived a benefit from the subject legislation that is greater in degree than that derived by the general public. The court further recognized that while the benefits accruing to nonobstetrical physicians was obviously less than those obtained by obstetricians, the Florida legislature had recognized this lessened benefit by assessing the nonparticipating physicians only $250.00 as compared to the $5,000.00 assessment to participating physicians. Accordingly, the court concluded that the Florida Legislature had a rationale basis for having enacted the subject assessment statutes and that the subject classification was not palpably arbitrary.

Further, the $250.00 assessment against non-participating physicians was but one source of funding of the Florida Birth-Related Neurological Injury Compensation Plan. Instead, the Plan was funded in the following manner:

(1). A $250.00 annual base assessment against all physicians licensed pursuant to Chapter 458 or Chapter 459, Florida Statutes, other than participating physicians. (§766.314(4), Fla. Stat.)

(2). A $5,000.00 annual base assessment against all participating physicians. (§766.314(4), Fla. Stat.)

(3). An annual base assessment against hospitals equal to $50.00 per infant delivered at the hospital. (§766.314(4)(a), Fla. Stat.)

(4). A $20,000,000.00 appropriation from the Insurance Commissioner's Regulatory Trust Fund, which was immediately paid to the Plan upon enactment of the subject statutes.

(5). Thereafter, if after taking into consideration the aforestated initial assessments, it was determined by the Florida Department of Insurance that such funds were insufficient to maintain the Plan on an actuarially sound basis, the Florida Legislature was mandated to appropriate for transfer to the Plan, an additional amount of up to $20,000,000.00, for a total appropriation of $40,000,000.00 (§766.314(5)(b), Fla. Stat.)

(6). Beginning January 1, 1990, an assessment against each entity licensed to issued casualty insurance in Florida pursuant to the specific formula specified in §766.314(7)(a), Fla. Stat.

Accordingly, the Plan was being funded not only by physicians who were directly affected by the medical malpractice crisis in Florida, but by other related classes which were also directly affected by the crisis, including a substantial appropriation by the Florida Legislature.

Pursuant to Rule 10, Supreme Court Rules, it is provided in pertinent part:

> ".1. A review on writ of certiorari is not a matter of right, but of judicial discretion. *A petition for a Writ of Certiorari will be granted only when there are special and important reasons therefor.* The following, while neither controlling or fully measuring the court's discretion, indicate the character of reasons that will be considered: . . .
>
> * * *
>
> (b). When a State court of last resort has decided a federal question in a way that conflicts with the decision of another State court of last resort or of a United States Court of Appeals.
>
> (c). When a State Court or a United States Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this court, or has decided a federal question in a way that conflicts with applicable decisions of this court."

In this case, the Florida Supreme Court, the Florida court of last resort, has not decided a federal question that conflicts with the decision of another State court of last resort or of the United States Court of Appeals, nor have the petitioners contended that such conflict exists.

Likewise, it cannot be said that the Florida Supreme Court has decided an important question of federal law which has not been, but should be, settled by the United States Supreme Court, nor has the Florida Supreme Court decided a federal question in a way that conflicts with the applicable decisions of the United States Supreme Court. Petitioners have not maintained that the Florida Supreme Court's decision decided a federal question in a way that conflicts with applicable decisions of this court. Instead, petitioners concede, and the Florida Supreme Court decision so reveals, that the Florida Supreme Court did not decide a federal question and, indeed, did not decide an important question of federal law in that the Florida Supreme Court did not even determine the constitutionality of the subject statute under the equal protection clause of the United States Constitution. Instead, all the Florida Supreme Court has done is make a determination that a tax statute enacted by the Florida Legislature did not violate the equal protection clause of the Florida constitution based upon the rationale delineated in *Eastern Airlines, Inc. v. Department of Revenue*, supra, which decision was based upon several United States Supreme Court decisions.

Accordingly, when it is recognized that the Florida Supreme Court merely declared a tax statute enacted by the Florida Legislature as not being in violation of the equal protection clause of the Florida Constitution based upon a previously decided Florida Supreme Court decision, which decision had been formulated by the use of several United States Supreme Court decisions, and did not decide a federal question nor specifically rule on the

constitutionality of a State statute under the equal protection clause of the United States Constitution, it cannot be maintained that there are special and important reasons for this court to review the final decision of the court of last resort in the State of Florida.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

*Wilbur E. Brewton
J. Riley Davis
Taylor, Brion, Buker & Greene
116 South Monroe Street
Post Office Box 11189
Tallahassee, Florida 32302-3189
(904) 222-7717
Attorneys for Respondents

*Counsel of Record